THE VIRGINIA DEBT CONTROVERSY

BY

JAMES G. RANDALL

REPRINTED FROM POLITICAL SCIENCE QUARTERLY
VOLUME XXX, NO. 4, DECEMBER, 1915

NEW YORK
PUBLISHED BY GINN & COMPANY
1915

THE VIRGINIA DEBT CONTROVERSY

BY

JAMES G. RANDALL

REPRINTED FROM POLITICAL SCIENCE QUARTERLY
VOLUME XXX, NO. 4, DECEMBER, 1915

NEW YORK
PUBLISHED BY GINN & COMPANY
1915

Digitized by the Internet Archive
in 2019 with funding from
University of Illinois Urbana-Champaign

https://archive.org/details/virginiadebtcont00rand

336.3409755
R15v

THE VIRGINIA DEBT CONTROVERSY[1]

A STATE in the American union possesses a unique status incapable of easy definition. It occupies a middle position, superior to that of a private litigant, but below that of a sovereign or independent nation. A state cannot in general be sued by individuals without its consent, but the performance of contracts in which individuals are concerned can be forced by the Supreme Court. When the contract is between two states it has a binding force greater than that of any treaty between nations. For while the general sanctions of international law are alone relied upon for the enforcement of treaties, an American state is definitely answerable to the Supreme Court for the performance of its obligations to other states, and is subject to judgment in case these obligations are neglected. Theoretically, of course, a state may resist the execution of a decree of the Supreme Court, but such resistance has been tried so seldom that it is out of the question as a practical course of action. The Supreme Court, it may be noticed, in deciding between states, exercises a power greater than that of an international arbitrator. It has the authority to

[1] I desire here to acknowledge my special indebtedness to Hon. A. A. Lilly, attorney-general of West Virginia, for supplying valuable documentary material, and to Col. William A. Anderson of Lexington, former attorney-general of Virginia, a man thoroughly familiar with every stage of the litigation, for his kind assistance in criticizing my manuscript and affording me the courtesy of a long interview. Valuable material, besides, has been lent to me, and bibliographical aids have been furnished by Dr. Herbert Putnam, librarian of Congress, and Dr. H. R. McIlwaine, state librarian of Virginia. Through the office of the clerk of the Supreme Court of the United States I have been kept advised of many important points in the litigation.

summon a defendant state on the filing of the plaintiff state's bill—a power which belongs to no international court. Its decrees, furthermore, are of more force than an arbitral award, for they are the law of the land. Thus, while a controversy between states may be quasi-international, and may often rest in principle on the law of nations, yet subordination and not sovereignty is its controlling feature.

When West Virginia parted from Virginia in 1863 there were two important matters which remained for later adjustment —the fixing of the boundary, and the apportionment of the debt. The first of these was settled with reasonable promptness by the Supreme Court in 1870, when the right of West Virginia to two counties in dispute was upheld.[1] The debt question has remained unsettled for half a century, during which time no part of the common debt has been assumed by the new state, while in the Old Dominion the debt has been ever present as a vexing problem, both in finance and in politics. The relations ensuing between the states, so far as they pertain to this debt, constitute the theme of this article.

The amount of Virginia's debt was $33,897,073.82 on January 1, 1861, a date selected because of its convenience in the calendar year, and because it roughly corresponds to the secession of Virginia and the *de facto* separation of the two states. An analysis of the substance of the debt will show that it comprised an elaborate series of schedules, representing expenditures, mostly since 1830, for river improvements, surveys, swamp reclamation, canals, roads, turnpikes, railroads, bridges and navigation companies. These expenditures, besides revealing a lively activity on the part of the state government for various forms of internal improvements, bring to light certain significant features of Virginia's method of promoting economic development. The practice of subsidizing railroads and im-

[1] In this case the jurisdiction of West Virginia over Berkeley and Jefferson counties was sustained. The acts of the "restored" government of Virginia were treated as valid, and the case therefore involves a recognition by the Supreme Court of the legality of the process by which West Virginia was created. This was simply an application of the Supreme Court's general policy of acquiescence in the settlement of political questions. 11 Wallace 39.

provement companies was prominent, and in many cases the state became a stockholder in private corporations, while in other cases the State Board of Public Works constructed purely governmental projects under the form of a corporation. The Covington and Ohio Railroad Company, for instance, was not a private corporation at all, but merely a legal form through which the Board of Public Works acted.[1]

That the east enjoyed more than a proportional benefit from these improvements was the repeated charge of West Virginia leaders. Representative Whaley, speaking in 1862 in the House of Representatives, declared that of the "forty-four millions" of state debt expended in internal improvements up to January 1, 1861, only one million and a half had been spent in the counties comprising West Virginia.[2] His statement was only a rough estimate, and of course did not take into account the considerable amount of bordering territory later added to West Virginia. Granville D. Hall, in his *Rending of Virginia*, dwells upon the partiality of the Richmond government to the eastern portion of the state, and shows that after the Baltimore and Ohio Railroad had extended its branch to Winchester the Virginia assembly refused further charters.[3] The Cleveland and Pittsburgh line in seeking a connection with Wheeling was denied a charter which would permit the building of a road on the Virginia side, being thus forced to run its line on the western bank of the Ohio, and to establish a terminus one mile away from its objective point. Moreover, from 1823 to 1861, the debt period, not a single public building had been completed within the limits of the new state.[4] These grievances, in the view of West Virginians, were aggravated by the greater pro-

[1] Report of Special Master, Commonwealth of Virginia *v.* State of West Virginia, March 17, 1910 (Charleston, W. Va., 1910).

[2] The "forty-four millions" was figured without reference to the amount redeemed by 1861. *Cong. Globe*, 37th Congress, 2nd session, p. 3269.

[3] Hall, Rending of Virginia, p. 60 ff.

[4] A sum of $98,000 out of an appropriation of $125,000 had been expended on the Trans-Alleghany Lunatic Asylum at Weston in Lewis county, which was unfinished in January, 1861. The remaining $27,000 was seized by the "restored" government and used in prosecuting the war. Debt Suit, Virginia *v.* West Virginia, (compiled by Attorney-General A. A. Lilly of West Virginia, 1913) p. 158.

portionate representation of the east in the legislature as compared with the west, and by various discriminations in the levying of taxes which favored eastern landlords and slave-owners.

On the other hand, men speaking for Virginia have claimed that the indebtedness was common to both sections, incapable of minute dissection according to locality, that it was largely incurred for improvements which benefited West Virginia, that many of the eastern lines of communication were designed ultimately to penetrate West Virginia territory, that the enormous increase in property values in West Virginia since the war gives evidence of the benefit derived from these expenditures, and that without the votes of the western delegates in the Virginia assembly only a small part of them would have been possible.[1] After balancing the claims of both sides, we may turn to the finding of the special master appointed by the Supreme Court in 1907 and discover that the total "expenditures made by the commonwealth of Virginia within the territory . . . of West Virginia since any part of the debt was contracted" was $2,811,559.98, which is less than one-tenth of the total debt as it stood in 1861.[2] We must, however, guard against the conclusion that West Virginia's rightful share of the debt is equivalent to the calculated amount of expenditures within her limits.

At the time of separation there were various agreements between the newly formed state and the "restored" state of Virginia regarding the matter of debt distribution, though of course there were no agreements to which Confederate Virginia

[1] Brief for Virginia in Virginia *v.* West Virginia, decided March 6, 1911. Statistics are submitted in this brief, showing that the assessed value of all property in West Virginia has increased from 126 millions of dollars in 1867 to 937 millions in 1908, an increase of 643 per cent; while in Virginia for the same period the assessed value of taxable property advanced from 354 millions to 661 millions, only 84 per cent. In attributing this advance to the old state's policy of internal improvements before the war, the counsel indulges in a decidedly specious argument.

[2] It is fair to state, however, that the master disallowed a number of items of expenditure on the ground that they were made in the form of stock subscriptions in improvement companies over whose property the state had no control except as a stockholder, and that technically these were not expenditures by the commonwealth. The addition of these items would swell the total to $3,915,960. Report of Special Master, paragraph iii.

was a party. On August 20, 1861, a Union convention at Wheeling claiming the character of a constituent assembly acting for all of Virginia (a claim which, however irregular, has nevertheless been legally sustained by various acts and decisions during and after the war) passed an ordinance to "provide for the formation of a new state out of the territory of this state." The following provision was contained in article 9 of this ordinance:

> The new State shall take upon itself a just proportion of the public debt of the Commonwealth of Virginia, prior to the first day of January, 1861, to be ascertained by charging to it all the state expenditures within the limits thereof, and a just proportion of the ordinary expenses of the State government since any part of said debt was contracted, and deducting therefrom the moneys paid into the treasury of the Commonwealth from the counties included within the said State during said period.[1]

If this provision should be regarded as binding upon the two states after reconstruction it would not only require West Virginia's assumption of a just share of the debt, but would determine, at least in general terms, the basis on which such apportionment should be made. The problem of definitely applying this much-mooted article, and of determining to what extent it should be deemed binding, has persisted as one of the leading issues throughout the whole litigation.

The constitution of West Virginia, framed by convention in November, 1861, and ratified in April, 1862, bound the new state to assume an "equitable proportion" of the debt up to January, 1861, and directed the legislature to ascertain the amount "as soon as possible" and to provide for its liquidation. The legislature of the "restored state," accepting the terms expressed in this constitution, gave its consent in May, 1862, to the creation of the new state. Congress, by an act of December 31, 1862, added its sanction to this agreement by admitting West Virginia into the union on the basis of her constitution and Virginia's act of consent. This action of Congress sealed the contract

[1] Hall, Rending of Virginia, p. 380; 220 U. S. 25.

between the states by which West Virginia was bound to pay an "equitable proportion" of the debt.[1]

Virginia complains that while she has made repeated efforts to secure a peaceable adjustment with West Virginia, and thus avoid a suit in the Supreme Court, the latter state has steadily refused to treat on the subject. It appears that the legislature of West Virginia in 1867 directed the governor to appoint commissioners to adjust the debt with Virginia. At the time, however, a suit between the two states involving two border counties was pending in the Supreme Court, and obviously no agreement could be reached until the exact extent of West Virginia was settled. Delay was also due to the anomalous condition of Virginia during reconstruction, the state not being readmitted into the union until 1870. In that year Virginia appointed three commissioners who were met by a committee of the West Virginia legislature, but no progress was made by this conference. Virginia in 1871 made an offer of "arbitration" by citizens outside the two states, but this was rejected by West Virginia on the ground that citizen commissioners within the states would be more familiar with the case, and that any adjustment should be subject to the ratification of the legislature of each state. A debt commission of three was created by West Virginia in 1871, and proceeded to Richmond to search documents, but the information solicited from the second auditor of Virginia was declined, and Governor Walker of Virginia refused to appoint commissioners to coöperate with the representatives of West Virginia.[2] The situation was now further

[1] Debt Suit, Virginia *v.* West Virginia, (Compiled by Attorney-General A. A. Lilly, Charleston, W. Va., 1913) p. 398 ff; Poole, Charters and Constitutions, pt. ii, 1989, 1992; Memorial of the Commissioners appointed by the Convention of West Virginia for Admission into the Union, Sen. Misc. Doc., no. 99, 37th Congress, 2nd session.

[2] The commissioners from West Virginia addressed a communication to the second auditor of Virginia, calling for specific information on a series of points touching the amount and disposition of the debt. To have supplied this information would have necessitated a laborious search through the records of the second auditor's office, and that of the Board of Public Works, and the information was therefore not furnished, though all the books and records were made available for the commissioners' inspection. Governor Walker's action in declining to appoint commissioners to treat with the West Virginia commission was due to his distrust of this method of settling the

complicated by certain measures of the Virginia legislature which funded the debt in such a way as to make settlement even more remote.

To these troublesome funding acts we must now turn our attention, noticing their bearings upon the interests of the bondholders and upon West Virginia's rights. The debt had piled up during the war and reconstruction,[1] till in 1871 the entire debt of Virginia amounted to forty-seven millions (counting the accumulated interest which had partially lapsed). The measure passed in 1871 for funding this debt proved exceedingly vexatious to the state. The law provided that new bonds for two-thirds of the debt were to be issued—certificates being given for the remaining third—the interest to be at six per cent, and the maturing coupons to be receivable for taxes. It soon became clear that this act, the passage of which had been hasty and not free from suspicion, would put the state under a burden which it could not bear. The people would not submit to an increase in taxation sufficient to carry the heavy interest payments and at the same time provide properly for the extension of popular education, the maintenance of the civil government, the support of state charities, and the care of the old soldiers. Popular feeling ran high as the debt question was carried to the hustings, and the struggle waxed hot between the "Funders" and the "Readjusters," the latter party favoring a scaling of the

debt, and to the fact that the younger state had refused arbitration. The commission from the new state after an independent investigation announced the finding that West Virginia's share of the debt was $953,360.28. The only result of these unfortunate incidents was to create a misunderstanding, and to cause the West Virginia authorities to feel, though perhaps unjustly, that they had been offended. Report of West Virginia Commissioners, West Virginia Compilation, I, 457–472; Debt Suit, pp. 12–20.

[1] In accordance with the general rule of international law the interest payments to Union creditors ceased during the war, but certain sums were remitted in coin to London for foreign bondholders, and small payments were made in Virginia in Confederate money. There were further payments during the period of reconstruction. Virginia's counsel showed in the 1911 suit that Virginia had paid nearly 11 millions on the undivided debt between 1861 and 1871. $7,255,723.66 was paid in interest during this decade, and bonds were redeemed to the extent of $3,710,449.67, thus making a total of $10,966,173.33, for which sum Virginia preferred, in her own right, an equitable claim for contribution. Complainant's Reply Brief, Debt Suit, 535–536; Hartman *v.* Greenhow, 102 U. S. 676.

debt, while the former insisted on the execution of the hard terms of the funding bill.

In 1879 a refunding scheme was enacted known as the "McCulloch bill" with a lower (graduated) rate of interest, but the act was unsuccessful owing to the failure of a sufficient number of the bondholders to avail themselves of it.

A landslide for the "Readjusters" led in 1882 to the passage of the "Riddleberger bill." The amount of the debt was restated at 21 millions, and bonds bearing three per cent and payable in fifty years were to be issued for any outstanding obligations of the state at ratios definitely specified in the case of each class of securities. It soon became clear that the Riddleberger settlement was unsatisfactory. The people in general approved it, but the correctness of the rate of scaling was questioned, and it was not sufficiently tempting to induce many of the old bondholders to accept its terms.[1]

Moreover, a serious difficulty had arisen in the meantime by reason of the tax-receivable feature of the old coupons. The state treasury was finding itself sadly embarrassed by the presentation of coupons in large numbers for the settlement of taxes, and a coupon agency maintained by bondholders was operating to intercept the state's revenue by selling coupons to tax-payers. A veritable legal war ensued between the State of Virginia and the bondholders, in the course of which the ingenuity of the legislature in obstructing the use of the tax-paying coupons was matched against the authority of the federal courts to which the "merciless bondholders" applied. To free the state from what seemed an intolerable situation, the tax-receivable feature of the act of 1871 was repealed. This repeal was invalidated as an impairment of contract, and then various devices, popularly known as "coupon killers" and "coupon crushers" were adopted for defeating the right to use coupons

[1] For the bearings of the funding acts upon Virginia's relation to the bondholders, see Special Message of the Governor of Virginia transmitting the Report of the Commission appointed on the Public Debt, Jan. 14, 1892. (This message, with accompanying documents, was recently reprinted for the use of the West Virginia Debt Commission.) The effect of these measures upon the internal politics of Virginia is vividly treated in Royall, History of the Virginia State Debt Controversy (Richmond, 1897).

for tax payment, such as forcing upon the tax-payer the expense of a suit in order to "verify" the coupons, excluding expert testimony to prove their genuineness, subjecting the coupons to a tax, and withholding the remedy of mandamus. These obstructive proceedings were declared invalid by the Supreme Court, but they served the purpose for the time, and were promptly followed by other provisions equally effective in protecting the treasury against the coupon brokers who were bidding fair to absorb a large part of the state's revenues.[1] At the same time the activities of "anti-coupon" men became pronounced, and those who tendered coupons for taxes were denounced in public meetings as enemies of the state.

Owing to the small number of creditors who accepted the new bonds provided in the refunding acts of 1879 and 1882, the debt by the year 1890 had become nearly unmanageable. The assembly therefore authorized a commission to negotiate with the bondholders. The result was the "Olcott settlement," enacted into law in 1892, by which the debt was scaled down, without, however, involving the charge of repudiation, since the bondholders by their committee had consented to the adjustment. In exchange for twenty-eight millions of outstanding bonds this act provided for nineteen millions of new bonds to run for one hundred years, the interest to be two per cent for ten years and three per cent for ninety years, the coupons not to be receivable for taxes. This settlement was, on the whole, satisfactory to the state.

Such features of these funding acts as concerned West Virginia now demand attention. The original funding act of 1871, assuming in the preamble that West Virginia contained at the time of separation "about one-third of the territory and population of the state of Virginia," provided for the surrender of the old

[1] A number of these cases reached the Supreme Court. The obstructive regulations were declared invalid, and the original contract of 1871 by which the coupons were made receivable for taxes was held to be a binding obligation upon the state, any impairment of which was in violation of the federal constitution. In most of the decisions mandamus writs compelling treasurers to receive the coupons were sustained. Hartman *v.* Greenhow, 102 U. S. 672; Antoni *v.* Greenhow, 107 U. S. 769; Virginia Coupon Cases, 114 U. S. 269; McGahey *v.* Virginia, 135 U. S. 662.

bonds in return for new bonds for two-thirds of the debt. For the unfunded third, certificates were to be issued providing payment "in accordance with such settlement as shall hereafter be made between the states of Virginia and West Virginia in regard to the public debt . . . at the time of . . . dismemberment." The same two-thirds division was observed in the act of 1879, and in place of a provision assuming a conditional liability for the unfunded portion, the law provided that Virginia would negotiate with West Virginia in the interest of the certificate holders and stipulated that "the acceptance of . . . certificates for West Virginia's one-third . . . shall be taken and held as a full and absolute release of the state of Virginia from all liability on account of said certificates." In the Riddleberger bill of 1882 and the Olcott settlement of 1892 the holders of the unassumed and unfunded third were still remanded to the tender mercies of West Virginia without any recourse upon the commonwealth of Virginia.[1]

These funding acts present several considerations which deserve careful attention. It will be noticed that, at a time when the division of the debt was subject to negotiation between the states, Virginia fixed her own and West Virginia's share without consulting West Virginia, and on no definite basis of apportionment other than a broad estimate that West Virginia comprised "about one-third" of the population and area of the undivided state. By her funding operations Virginia scaled down the debt, secured a lower rate of interest, and derived other advantages. By the acts subsequent to 1871 she sought to release herself from any liability for the unfunded portion.[2]

[1] A brief summary of these funding acts is to be found in the Supreme Court's decision in Virginia *v.* West Virginia, 220 U. S. 1. See also Debt Suit, p. 30 ff.

[2] In considering Virginia's liability for the unfunded third of the debt it should be noted that none of the refunding acts passed since 1871 made the surrender of the old certificates compulsory. As a matter of fact the majority of the holders declined to accept the new securities, and the refunding operations must be regarded as only partially successful. As to the original funding act of 1871, the fair inference is that the law did not release the state of Virginia from its obligation to pay the unfunded portion in case West Virginia should fail to do so. The case of Antoni *v.* Wright, tried before the highest court of Virginia, involved the question whether a valid contract had been made by the funding act of 1871 between Virginia and her creditors. The dissenting judge, Staples, in order to show that the act lacked the essentials of a

On the other hand it may be said in her favor that the old unsatisfactory condition of the debt could not continue much longer; that until a settlement between the states should be reached the bondholders would look to her for satisfaction, whereas West Virginia might delay indefinitely without any impairment of credit; that Virginia's reorganization of the debt at a lower rate of interest would eventually inure to the advantage of West Virginia when a settlement involving interest should finally be made; and that a sum exceeding ten millions had already been contributed by Virginia on the undivided debt previous to 1871 before any funding had been undertaken.[1] However natural might be West Virginia's reasons for delaying payment, the fact remained that during the period of delay the direct responsibility to the creditors belonged to Virginia, and it was unreasonable to expect her either to postpone her refunding until a final settlement should be made, or to conduct such refunding without at least some tentative recognition of West Virginia's liability.

That the two-thirds division, however, was something more than a tentative arrangement for adjusting the debt became evident by later legislation. In 1894 the Virginia assembly passed a joint resolution creating a commission to represent the holders of the certificates and to negotiate with West Virginia for an adjustment of the long-standing debt controversy. It was provided that this commission should "in no event enter

contract, declared that the state of Virginia derived no benefit which could be regarded as a "valuable consideration," and argued emphatically that the state had not been released from its former obligation for the whole debt. In this connection he said: "If she [West Virginia] repudiates her obligations, there is no agreement or understanding absolving the state from the payment of such third. It is as much bound for the payment of the whole debt as before the passage of the funding bill." These dissenting views of Staples are quoted in a later case before the supreme court of Virginia, and this part of his argument is approvingly referred to in the majority opinion as "unanswerably clear." Greenhow *v.* Vashon, 81 Va. 336. Certificates under the later refunding acts, however, contained a definite clause precluding any recourse upon Virginia, and finally the settlement between the creditors' committee and the debt commission involved a promise on the part of the creditors to accept the amount realized as a result of a suit or of the commission's negotiations without any further recourse upon Virginia.

[1] See note 1, p. 559.

into any negotiation . . . except upon the basis that Virginia is bound only for the two-thirds of the debt of the original state, which she has already provided for as her equitable proportion thereof."[1] Such a limitation of the powers of the commission weakened its effectiveness as an agency for securing a settlement with West Virginia.[2] By an act of 1900 the powers of the commission were modified. According to this law, whenever two-thirds of the holders of certificates based upon the act of 1871 and a majority of other certificate holders should give their consent, the commission was to be invested with control of the certificates with the understanding that the holders would accept the amount realized from West Virginia as a full settlement of all their claims. Through the proper committee the certificate holders contracted to accept the results of any settlement by the commission, or any adjudication reached by the prosecution of a suit.[3] The result of this arrangement would be that if a settlement were made by which West Virginia assumed less than one-third, then the certificate holders and not Virginia would stand the loss. All of the commission's efforts to adjust the debt by negotiation have been unavailing. In spite of this, no opportunity to pass upon the matter as a controversy between the two states was presented to the Supreme Court until 1906.

In the case of the Commonwealth of Virginia *v.* the State of West Virginia, begun in 1906, the plaintiff sought to have West Virginia's share of the debt determined and to secure a decree requiring its payment.[4] The Supreme Court was found to be

[1] Joint resolution of the General Assembly of Virginia, approved March 6, 1894, creating the "Virginia Debt Commission." This commission for negotiating with West Virginia should be distinguished from the earlier commission which effected the settlement with the creditors in 1892.

[2] The statute of 1894 did not mean that the commissioners should decline a settlement with West Virginia for less than one-third of the debt, but merely that the bondholders, not Virginia, would lose the difference in case such a settlement were made.

[3] West Virginia Compilation, I, 86–87. See note 4.

[4] For a full account of the proceedings and briefs in this suit, both on the demurrer and on the reference to a special master, see: Proceedings in the Equity Suit of the Commonwealth of Virginia *v.* the State of West Virginia, compiled by W. G. Conley,

a slow-grinding mill. The first point of contention arose over the question of jurisdiction. West Virginia presented a demurrer and argued stoutly against the Supreme Court's jurisdiction in the case. Her counsel maintained that this was not a controversy between states, since Virginia had by her funding operations disposed of the state's interest in the deferred portion of the debt which she had assumed to be West Virginia's share. The Supreme Court made short work of West Virginia's cry of no jurisdiction,[1] and answered it by merely asserting its original jurisdiction in suits involving pecuniary demands between states. The demurrer was overruled in a brief decision which did not go into the merits of the case and expressed no opinion regarding the legal effect of Virginia's refunding operations.

Following the overruling of West Virginia's demurrer in May, 1907, the next phase of the case was the appointment of a special master to whom certain statistical points were referred for ascertainment. Each party prepared its draft of a decree of reference, supporting the drafts with contending briefs and reply briefs, besides oral arguments of counsel. The court, steering a middle course, issued as colorless a decree as possible, asking the master to investigate certain points "without prejudice to any question in the case." Then followed another series of briefs and replies occasioned by a motion on the part of the defendant to modify the decree of reference.

This contention over the wording of the decree brought to light the fundamental difference between two alternative methods of apportioning the debt. The assumed international law basis might be taken, which would require the division of the debt according to the relative area, population and taxable property of the two commonwealths. Or, on the other hand, the provision of the Wheeling ordinance might be treated as a binding agreement which would require the ascertainment of West Virginia's liability according to a definite plan of calculation. This plan assumed that on the division of a state local debts

attorney-general of West Virginia (Charleston, W. Va., 1907; 2 vols. with appendix). For convenient reference this work is cited throughout the article as the West Virginia Compilation.

[1] 206 U. S. 290.

go with the territory to which they belong. At every stage in the controversy, the only liability which West Virginia has admitted is on the basis of the Wheeling ordinance.

Accountants who have worked on the subject have found the ordinance very difficult to apply in detail, but if the method of calculation stipulated in the ordinance were applied according to West Virginia's construction, and without including interest on the public debt as an "ordinary expense" to be proportionally charged against the new state, then it appears that West Virginia would actually have a balance *in her favor* of from $769,000 to $3,123,000, the exact amount varying according to the different ways of construing the ordinance.[1] This startling fact, it may be noticed, is proof of the wisdom of the Supreme Court in awaiting the master's preparation of full statistics before committing itself to any definite method of apportionment. No such statistical inquiry had been made when the terms of the ordinance were framed.

Virginia's attitude on the ordinance has not been one of unqualified opposition. Her counsel have contended that the ordinance fixed upon West Virginia an obligation to bear a "just proportion" of the state debt, and that its terms should never be so construed as to defeat the primary intention of securing an "equitable" settlement. To make it operative as a method of determining the amount to be assigned to each state without including interest as an ordinary expense which under its terms should be charged against West Virginia would, according to Virginia's contention, be a gross injustice. It was urged on behalf of the old state that all the provisions at the time of separation should be taken together and construed according to their obvious intent. The constitution of West Vir-

[1] The following calculations have been made on the basis of the Wheeling ordinance, the balance in each case being in West Virginia's favor. Dividing ordinary expenses on the basis of population without slaves, the balance would be $769,073.57; on the basis of total population, $2,232,042.80; on the basis of the valuation of real and personal property, $3,123,818.76. These calculations all omit interest in estimating the new state's "proportion of the ordinary expenses of the state government" during the debt period, nor are the amounts expended in improvements through corporations charged against West Virginia. Complainant's Reply Brief, Appendix no. vi, Debt Suit, p. 530.

ginia recognized a "previous liability" and promised that the state would bear an "equitable proportion" of the debt, but omitted the terms of calculation found in the ordinance. These terms were also omitted in the act of acceptance by which the "restored" government of Virginia "conceded" to the new state its right to exist. The apportionment, according to Virginia's claim, should be made on some basis which would take into account relative population, area and property values at the time of partition.

In its decree referring the cause to a special master the Supreme Court specified in seven clauses the distinct points on which the master was to prepare findings based on evidence. He was to ascertain the amount and form of the debt on January 1, 1861; the extent and value of the territory of the two states on June 20, 1863, and the population with and without slaves at the same date. Besides these points the decree contained various items derived from the Wheeling ordinance. The special master [1] employed expert accountants and conducted many hearings, as his elaborate reports, schedules and exhibits indicate. He had little difficulty in determining the amount of the debt to be $33,897,073.82.[2] He found that the free population at the time of separation was so divided as to give West Virginia almost exactly one-third, while she possessed only 24.5 per cent of the population with slaves.[3]

An important feature of the master's report related to property valuation. The fifth clause of the decree made it necessary to ascertain the fair valuation of real and personal property in the two states on June 20, 1863. Two difficulties were en-

[1] Charles Edgar Littlefield, formerly a member of the House of Representatives, and attorney-general of Maine.

[2] Certain bonds of the commonwealth had been acquired by the state authorities and held in the "sinking fund" created for the gradual redemption of the debt, and in the "literary fund" devoted to educational purposes. Virginia urged that these sums, approximately $2,500,000, should be added to the debt, but the master ruled out the items on the ground that the acquisition of state bonds as a part of the public funds of the state was virtually an extinguishment of the debt to that amount. Master's Report, paragraph i. Virginia's objections under this head were later withdrawn, 220 U. S. 3.

[3] Master's Report, paragraph ii.

countered here. The ravages of war had caused great depreciation of property, at the same time making its value difficult of ascertainment, and the Confederate currency of the time was a false standard by which to measure this value. The master, after examining all the available evidence, estimated that real estate in Virginia had depreciated one-half, as compared to 1860 or 1861, and made his finding on this basis, allowing for no depreciation in West Virginia, however, except in the eastern counties. This finding gave West Virginia real estate a value of 67 millions in round numbers as against 148 millions for Virginia. Regarding personal property, the master discovered an actual increase in value during the war,[1] and reported 403 millions of dollars as the valuation of Virginia, including slaves, as against 30 millions for West Virginia. The total real and personal property in 1863, including slaves, was found to be 551 millions in Virginia and 98 millions in West Virginia. Estimating the debt on this basis West Virginia would pay about 15 per cent. Without slaves the total value of all property in Virginia was found to be 300 millions and in West Virginia 92 millions; on this basis West Virginia would be charged with 23.5 per cent. of the debt.[2]

The jurisdictional question having been settled and the master's report completed, the case was reopened before the Supreme Court in March, 1911. The counsel for Virginia emphasized the broad equities of the case, declaring that, of the common debt, Virginia, "at a painful sacrifice, from the scant means of an impoverished people," had paid or assumed

[1] The quantity of personal property was considerably reduced, but, in the opinion of the special master, this was more than offset by the immense increase in the demand for such property as horses, cattle, sheep, and hogs, due to the presence of large armies. In the master's calculation allowance was made for property exempted from taxation, such as mechanics' tools and agricultural implements, and all necessary corrections due to the character of the money standard were made. Master's Report, paragraph v. The counsel for Virginia strenuously opposed this feature of the master's finding in his brief before the Supreme Court in March, 1911. Debt Suit, p. 438 ff.

[2] The exact figures were $300,887,367.74 for Virginia (76.5026 per cent), and for West Virginia $92,416,021.65 (23.4974 per cent). Master's Report, paragraph v, p. 172.

seventy-four millions,[1] principal and interest, while West Virginia, although profiting from the liberality of the old commonwealth, "had not paid one dollar, but had refused to pay, and had denied her liability to pay any part of the debt."[2] The specific relief sought by Virginia, therefore, was to have West Virginia's portion of the common indebtedness ascertained and to secure its payment. West Virginia's original promise to bear a just proportion of the debt must be met, and in ascertaining her proportion not only the Wheeling ordinance, reasonably construed, but the later and paramount provisions of West Virginia's first constitution and the restored state's act of consent were to be considered. By these acts West Virginia was made liable for an "equitable" share of the debt, and if she had not assumed it Congress would never have consented to the erection of the new state. Proceeding to an analysis of the master's findings, Virginia's counsel then insisted that, in spite of the master's conclusion, all expenditures by Virginia through joint stock companies within the limits of the new state should be charged against West Virginia, and that under the head of ordinary expenses of the state government West Virginia should be charged with interest, since it was the "largest, most important, regular and necessary" of the charges against the state. The claim that Virginia had no interest in the suit was held to be unwarranted, because she was the trustee for the holders of the deferred certificates, and because the refunding acts, since they did not force the exchange of the old certificates for the new, had not affected the state's former obligation to satisfy the certificate holders under the act of 1871, to whom she was still liable.

Adopting a composite basis of calculation, combining territorial area, population with slaves, and assessed values of land,

[1] This 74 millions, figured at the close of 1910, comprised the interest payments already made, the payments retiring portions of the principal, and the amount outstanding and unpaid, about 25 millions, on which Virginia regularly pays interest. Debt Suit, p. 384.

[2] The legislature of West Virginia resolved in 1905 "that the state of West Virginia does not owe any part of the so-called Virginia debt, and that this legislature is opposed to any negotiations whatsoever on the subject." Joint Resolution no. 3, adopted January 20, 1905.

Virginia's counsel estimated that West Virginia should assume $9,652,768.83 of the original debt.[1] In addition, she should pay interest from January 1, 1861, until the final discharge of the obligation.

In West Virginia's answer the history of the case was reviewed in justification of the state's separation from Virginia and of its delay in payment of the debt; the points previously urged in the contention over jurisdiction were repeated and new arguments were introduced. Virginia had no right, so the argument ran, to receive the payment of West Virginia's portion of the debt after she had by her refunding acts released herself from all liability beyond her own admitted share. Virginia was debarred also because she had no direct interest in the suit.[2] She could make no accounting as to the subject-matter of the controversy because her creditors had already agreed as to the amount which she should assume, and because the new state's liability, "if any exists," is direct to the creditors and not to Virginia. This is not a general debt, representing expenditures which give equal benefit to all parts of the state, but a local one covering internal improvements nine-tenths of which are confined to Virginia, and no rule of public law requires the apportionment of such a debt on the basis of taxable property. This case, moreover, is controlled by a special agreement, the Wheeling ordinance of August 20, 1861, which is a binding contract between the states. This ordinance, which must be applied as a whole, not merely in part, specifies a particular method of ascertaining the amount which West Virginia should pay. It does not assume any part of the debt as such, but adopts a method of calculation which takes into view the equalization of past inequalities as well as the assumption of future liabilities. Granted, however, that the Wheeling ordinance should be set aside, then the effect would be to place the ascertainment of the debt in the hands of the legislature of West Virginia according to the provision of the new state's constitu-

[1] It is well to notice in this connection that, in pleading before the Supreme Court, Virginia does not urge the two-thirds division as the proper apportionment of the debt, though in her own laws the finality of this division is constantly assumed.

[2] New Hampshire *v.* Louisiana, 108 U. S. 76.

tion. As to paying interest from January 1, 1861, there can be no such obligation resting on West Virginia, since the only agreement at the time was that West Virginia should pay the "accruing interest," to be dated from the transfer of the debt. This, in brief, was the substance of West Virginia's case, though various minor objections of a technical sort were advanced, as, for instance, that Virginia's demand was "multifarious," and that the suit, having been neglected for so long a period, was now debarred by laches.

The Supreme Court, adopting more the tone of a mediator than a judge, based its opinion on the high grounds of general justice, and treated the subject in a broad and untechnical way.[1] The provision in the constitution of the would-be state, the consenting act of the "restored" Virginia legislature, and the admission statute passed by Congress were held by the court to have created a contract between the two states calling for the payment by West Virginia of a just and equitable proportion of the debt. This contract was not affected by the Wheeling ordinance, inasmuch as none of these three acts mention the ordinance, and since an application of the ordinance would defeat the broad purpose of securing an "equitable" settlement. If any doubt exists on this point, the circumstances at the time of separation were such that Virginia should have the benefit of the doubt. Regarding the suggestion of dividing the liability minutely according to territory, in accordance with the location of the improvements, the court declared that the debt was general, designed for the ultimate good of the whole state, that many of the improvements in Virginia were intended for ultimate extension westward, and on this ground it refused to lose itself in futile detail in an attempt to localize the burden for each transaction which the debt represented. The claim that West Virginia's constitution had made her legislature the sole agency for settling the debt was overruled, and the court then

[1] "The case is to be considered in the untechnical spirit proper for dealing with a quasi-international controversy, remembering that there is no municipal code governing the matter, and that this court may be called on to adjust differences that cannot be dealt with by Congress or disposed of by the legislature of either state alone." 220 U. S. 1, p. 27.

proceeded to the consideration of acts subsequent to the formation of the contract. The objection that because of her funding acts Virginia had no interest in the suit, having discharged herself of all liability to the deferred creditors, was waved aside as a mere technical argument. West Virginia's liability was declared to be a "deep-seated equity," not discharged by changes in the form of the debt, and the suit was held to be of deep concern to Virginia's honor and credit in spite of the fact that she would turn over the proceeds.[1]

In figuring the proportion the court made scant use of the master's voluminous findings, and disregarded the Wheeling ordinance. The master's estimate of the value of real and personal property in the two states in June, 1863, exclusive of slaves,[2] was taken as an equitable basis of division, and the total principal to be apportioned was declared to be $30,563,861.56, thus deducting a sum of $3,333,212.26 which Virginia had virtually extinguished by a composition with her creditors. Placing Virginia's share of this reduced total at 76.5 per cent and West Virginia's at 23.5 per cent, the amount of principal assigned to West Virginia was $7,182,507.46.[3]

The decision in this form was not a final decree. One point in particular was left open, namely, the difficult question of West Virginia's liability to pay interest.[4] The court recom-

[1] Compare United States *v.* Beebe, 127 U. S. 338, 342; United States *v.* Nashville, Chattanooga and St. Louis Ry. Co., 118 U. S. 120, 125, 126.

[2] It was to Virginia's advantage that slaves should be left out of the calculation in determining the total property values as a basis for apportioning the debt, inasmuch as slave property was of much less importance in West Virginia than in Virginia.

[3] "Virginia with the consent of her creditors has cut down her liability to not more than two-thirds of the debt, whereas at the ratio shown by the figures her share, subject to mathematical correction, is about .7651. If our figures are correct, the difference between Virginia's share, say $25,931,261.47, and the amount that the creditors were content to accept from her, say $22,598,049.21, is $3,333,212.26; subtracting the last sum from the debt leaves $30,563.861.56 as the sum to be apportioned. Taking .235 as representing the proportion of West Virginia we have $7,182,507.46 as her share of the principal debt." 220 U. S. p. 35.

[4] Though not involving any decision regarding interest, the opinion of March, 1911, hinted that Virginia's claim for interest dating from January 1, 1861, was extreme. "It would be a severe result," said Justice Holmes in delivering the opinion, "to capitalize charges for half a century—such a thing hardly could happen in a private case analogous to this. Statutes of limitation, if nothing else, would interpose a bar." 220 U. S. p. 36.

mended that a conference between the states be held for the purpose of making final adjustments, and suggested that the case, being one between "great states," called for forbearance on both sides. It was understood that if the states should be unable to arrive at a friendly settlement, the Supreme Court would impose a final decree based upon a master's calculation. Efforts were made by the Virginia commission to secure such a compromise, but West Virginia delayed two years before taking action looking towards adjustment, pleading meanwhile that the legislature alone could act, and that in the special session of May, 1911, called for another purpose, the debt could not legally be considered.[1]

On February 21, 1913, at its regular session the West Virginia legislature tardily created a commission of eleven members empowered to "negotiate . . . for a settlement of West Virginia's proportion of the debt of the original commonwealth," requiring, however, that the commission should determine nothing finally, but should report its action to the governor who should then convene the legislature for the "consideration" of the question. This commission was organized in June, 1913, and a joint session with the Virginia commission was held at Washington July 25–26. As neither commission had any terms to submit in the form of a definite proposition, the session adjourned without result. A long delay again followed, and the West Virginia commission proceeded to the slow process of "preparing a proposition," probably intending after careful and deliberate study of the subject to submit the offer of a lump sum for full settlement. Virginia twice petitioned the Supreme Court to proceed to a final hearing of all points left open in March, 1911, but the court, satisfied of the bona-fide intention of West Virginia to make an adjustment, denied both motions.[2]

On March 4, 1914, the commissions from the two states again met in Washington, and the negotiations hinged upon a "proposition" offered by West Virginia. The men from the

[1] Proceedings in the Virginia Debt Case, printed by order of A. A. Lilly, attorney-general of West Virginia. (Charleston, W. Va., 1913.)

[2] 222 U. S. 17 (October, 1911); 231 U. S. 89 (November, 1913).

new state claimed the "discovery" of an extensive series of credits and assets which would materially reduce the amount of their obligation. It is impossible here to enumerate these items, but they consisted mainly of cash on hand in the Virginia treasury in various funds, railroad and bank stocks sold by Virginia without West Virginia's consent though they had been acquired by funds common to both states, interest and dividends on investments etc. The valuation of these securities as of January 1, 1861, was estimated at $20,810,357.98, and West Virginia's net share of these assets (.235 minus certain minor reductions) was figured at $4,855,312.18. After subtracting this amount from West Virginia's share as fixed by the Supreme Court ($7,182,507.46), the commission announced that the balance, $2,327,195.28, would be the proper sum to be paid by the new state as a final satisfaction. In case Virginia should accept, the commission offered to recommend a called meeting of the legislature to vote this sum. The offer was rejected by the Virginia commission.[1]

In the following month, April, 1914, the case was reopened before the Supreme Court on a motion of West Virginia to "file a supplemental answer." West Virginia's case centered on these "newly discovered" credits. In rejoinder Virginia's counsel urged that after forty years of controversy and eight years of litigation before the Supreme Court, after all the documents and records had been exhaustively ransacked and elaborate findings presented by the special master, and after the Supreme Court in a "final" hearing of the case had fixed West Virginia's share of the principal at seven millions, it was no longer in order for the defendant state to present a totally new line of defense which was open to her from the first, and thus to prolong the litigation.[2]

Chief Justice White, in delivering the opinion of the court of June 8, interpreted the decision of 1911 as intended to leave open merely the question of interest, and any changes

[1] Statement of Negotiations between the Debt Commissions of the Two States (printed by order of W. Va. Com., March, 1914).

[2] Brief for Complainant, April 13, 1914 (Appeals Press, Richmond).

that might possibly be necessitated through clerical error.[1] It was intimated that most of the items in the supplemental answer had been contained in the master's report, and that all the credits so presented were "known or could have been known by the use of ordinary diligence by those representing West Virginia." The court granted the defendant's motion to file the supplemental answer, even though such permission would not be allowed to a private litigant, on the ground that the intention throughout had been to handle the case on the broadest lines of justice, and to leave no "room for the slightest inference that the more restricted rules applicable to individuals [had] been applied to a great public controversy, or that anything but the largest justice after the amplest opportunity to be heard [had] in any degree entered into the disposition of the case." A special master was appointed to consider the answer with Virginia's traversing arguments, and to report his findings in the following October.

What may be regarded as the concluding stage in this litigation was at last reached on June 14, 1915, when Mr. Justice Hughes announced the final decree of the Supreme Court touching upon all the points still left open. It is impossible in the limited space to do more than briefly to suggest the effect of this important decision. An extensive and essentially new investigation had been completed by the master, and the court considered his findings together with the exceptions thereto which were urged by Virginia, the bondholding creditors and West Virginia. The various classes of credits claimed in West Virginia's supplemental answer were allowed on the ground that they consisted of moneys and securities specifically dedicated to the payment of the debt, and that it would be inequitable to charge the new state with her proportion of the debt and refuse to recognize her share of the assets pledged as security for its discharge. Using, in the main, the master's valuation of these assets as of January 1, 1861, the court found the total amount of the credits to be $14,929,161.44. West Virginia was credited with 23.5 per cent of this amount, but at the same time

[1] 234 U. S. 117.

charged with $541,467.76 received, in money and securities, from the "restored government" of Virginia. This would give West Virginia a credit of $2,966,885.18, which, deducted from the $7,182,507.46 of the 1911 decision, would leave as her equitable proportion of the principal debt the sum of $4,215,622.28.

So much of the decision was favorable to West Virginia. On the vital subject of interest, however, Virginia's main contention was sustained. The court declared in this connection:

> As it was plainly not the intention either that the bondholders should go without interest as to the proportion assumed by West Virginia, or that there should be left with Virginia the entire burden of meeting the interest on the outstanding bonds while the principal was apportioned, it must follow that the assumption of an equitable share by West Virginia related to the liability for both principal and interest. We cannot read the contract otherwise. Nor do we think that in the construction of the provision of the constitution of West Virginia (Art. viii, sec. 8), which defines her engagement, the second clause can be ignored. After stating that an "equitable proportion" of the public debt shall be assumed by West Virginia, it is provided that "the legislature shall ascertain the same as soon as may be practicable, and provide for the liquidation thereof, by a sinking fund sufficient to pay the accruing interest, and redeem the principal within thirty-four years." If there could otherwise be any doubt as to what was embraced in the contract of assumption, this provision would dissipate it.

The question as to what rate of interest should be charged was a problem complicated by the fact that Virginia had not paid upon her share the rate reserved in her bonds, that bonds had been issued for back interest, that interest upon interest had been paid, and that from time to time arrangements with the creditors had been made by the old state for varying rates of interest. The court came to the conclusion that the equitable rights of both states would be substantially respected by figuring the interest from January 1, 1861, to July 1, 1891, at four per cent, and from July 1, 1891, to July 1, 1915, at three per cent. The interest thus amounted to $8,178,307.22, and West Virginia's total obligation, principal and interest, was set at

$12,393,929.50. Furthermore, upon this amount awarded, interest at five per cent was to be charged from the date of the entry of the decree until payment.[1]

On the whole this decision will be regarded as a victory for Virginia, yet it contains the essential features of a compromise. Whether West Virginia could have made better terms by negotiation at any time since 1911 is doubtful, though it seems clear that a peaceable adjustment prior to that time would have been to her advantage. Inasmuch as the matter has now been disposed of by a final decree of the highest tribunal, fixing a definite award, it would seem that the only remaining step in the proceedings is for West Virginia's legislature to vote the stipulated amount, issuing bonds as a convenient way of financing the operation. Yet as these lines are being written there are rumors that there will still be some obstruction placed in the way of the bondholders' recovery of the amount due, and that resort to some form of compulsion will be necessary.[2]

JAMES G. RANDALL.

ROANOKE COLLEGE.

[1] 35 Sup. Ct. Rep. 795. In the published decision the date July 1, 1915, was used for convenience, but in the actual award the interest was to be calculated to the date of entry of the decree.

[2] For a possible method of executing a financial judgment of the Supreme Court against a state, see South Dakota *v.* North Carolina, 192 U. S. 286.

THE ACADEMY OF POLITICAL SCIENCE

IN THE CITY OF NEW YORK

The Academy of Political Science is affiliated with Columbia University and is composed of men and women interested in political, economic and social questions. The **annual dues** are five dollars. Members receive the Proceedings and the Political Science Quarterly—each issued four times a year—and are entitled to free admission to all meetings, lectures and receptions under the auspices of the Academy.

Communications regarding the Academy should be addressed to **The Secretary of the Academy of Political Science,** Columbia University.

THE POLITICAL SCIENCE QUARTERLY

Managing Editor
THOMAS REED POWELL

The Quarterly follows the most important movements of foreign politics but devotes chief attention to questions of present interest in the United States. On such questions its attitude is nonpartisan. Every article is signed; and every article, including those of the editors, expresses simply the personal view of the writer. Each issue contains careful **book reviews** by specialists, and in March and September numerous recent publications are characterized in brief **book notes.** In June and December is printed a valuable **record of political events** throughout the world.

Communications in reference to articles, book reviews and exchanges should be addressed to the **Political Science Quarterly,** Columbia University, New York City. Intending contributors are requested to retain copies of articles submitted, as the editors disclaim responsibility for the safety of manuscripts. If accompanied by stamps, articles not found available will be returned.

Subscriptions should be forwarded and all business communications addressed to the publishers, **Ginn & Company,** Lancaster, Pa., or 70 Fifth Avenue, New York.

Yearly subscription, three dollars; single number, seventy-five cents. Back numbers and bound volumes can be obtained from the publishers.